TOTTI TRADING v. PP

COURT OF APPEAL, PUTRAJAYA
ZAKARIA SAM JCA
VERNON ONG LAM KIAT JCA
KAMARDIN HASHIM JCA
[CRIMINAL APPEAL NO: J-09-5-01-2017]
11 DECEMBER 2017

CRIMINAL LAW: *Money laundering – Offences – Order of forfeiture – Setting aside – Application for – Preliminary objection raised by prosecution – First judge had earlier allowed prosecution's application in default of appearance by appellant and ordered certain amount of money found in appellant's current bank account to be credited to Government – Whether first judge's order final order – Whether liable to be set aside ex debito justitiae by second judge – Whether functus officio – Forfeiture order being default order made in absence of appellant – Whether rules of natural justice and procedure breached – Whether forfeiture order a nullity and not regularly obtained – Whether appellant entitled in law to apply and set aside order without resort to filing of appeal – Anti-Money Laundering and Anti-Terrorism Financing Act 2001, s. 56 – Federal Constitution, art. 13*

CRIMINAL PROCEDURE: *Forfeiture – Order of – Setting aside – Preliminary objection raised by prosecution – First judge had earlier allowed prosecution's application in default of appearance by appellant and ordered certain amount of money found in appellant's current bank account to be credited to Government – Whether first judge's order final order – Whether liable to be set aside ex debito justitiae by second judge – Whether functus officio – Forfeiture order being default order made in absence of appellant – Whether rules of natural justice and procedure breached – Whether forfeiture order a nullity and not regularly obtained – Whether appellant entitled in law to apply and set aside order without resort to filing of appeal – Anti-Money Laundering and Anti-Terrorism Financing Act 2001, s. 56 – Federal Constitution, art. 13*

The Public Prosecutor ('PP') filed an application (encl. 2) for a forfeiture order pursuant to s. 56 of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('AMLATFA'). By the said enclosure, the PP sought an order for the publication of a notice in the *Gazette* pursuant to s. 61(2) of the AMLATFA for the appellant to attend before the High Court to show cause as to why cash totalling RM1,055,000 or any accreditation to it in the appellant's current account with Hong Leong Bank ought not to be forfeited. On the appointed date of hearing *ie* 25 November 2011, Justice Abd Halim Aman (' judge 1') allowed the PP's application in default of appearance by the appellant and ordered the sum of RM1,055,000 be credited to the Government of Malaysia ('the forfeiture order'). Some five years later, the appellant discovered for the first time about the existence of the forfeiture

order. The appellant then instructed its solicitors to file an application to set aside the said forfeiture order. The appellant's application came before Justice Mohd Sofian ('judge 2') for disposal. Prior to the hearing of the application to set aside the forfeiture order, the PP raised a preliminary objection ('PO') that the High Court was *functus officio* as the order dated 25 November 2011 was a final order. The PO was upheld by judge 2, who thereby dismissed the appellant's application to set aside the forfeiture order. Aggrieved with the decision of judge 2, the appellant appealed to this court. The appellant canvassed two main grounds, namely (i) judge 2 had erred in holding that he had no jurisdiction to set aside the forfeiture order dated 25 November 2011 granted by judge 1; and (ii) judge 2 erred in holding that the appellant must only appeal and that he could not exercise his inherent powers to set aside the forfeiture order.

Held (allowing appeal)
Per Kamardin Hashim JCA delivering the judgment of the court:

(1) The rules of natural justice and procedure which form an integral part of the common law must be fully satisfied before one's property can be forfeited without any compensation. The right to be heard is one of the pillars of the rules of natural justice. Any breach of these rules amount to a contravention of art. 13 of the Federal Constitution. The forfeiture order being a default order made in the absence of the appellant and without hearing the appellant, was an order in breach of natural justice and therefore, liable to be set aside on *ex debito justitiae* by judge 2. Judge 2 had clearly erred when His Lordship allowed the PO. (paras 19 & 20)

(2) The appellant had not appealed to the High Court and was not seeking for the High Court to review or overrule the earlier decision made by judge 1. Therefore, the forfeiture order dated 25 November 2011 was not a final order and it was not appealable. What the appellant asked was for judge 2 to invoke its inherent powers to set aside the forfeiture order on the grounds of breach of the rules of natural justice and/or on the maxim of *audi alteram partem*, nullity and illegality. Judge 2 could and was competent to set aside the forfeiture order earlier made by judge 1. The fact that the forfeiture order was a nullity as it was in breach of the rule of natural justice and to add, not regularly obtained, the appellant was entitled in law to apply and set aside the impugned order without resort to filing of an appeal. (paras 27 & 31)

***Bahasa Malaysia** Headnotes*

Pendakwa Raya ('PR') memfailkan permohonan (lampiran 2) untuk perintah pelucuthakan menurut s. 56 Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001 ('AMLATFA'). Melalui lampiran tersebut, PR menuntut perintah penerbitan notis dalam *Warta* bawah s. 61(2) AMLATFA untuk perayu menghadirkan diri di Mahkamah Tinggi bagi menunjukkan sebab mengapa jumlah wang RM1,055,000 atau mana-mana akreditasi kepadanya dalam akaun semasa perayu dengan Hong Leong Bank tidak patut dilucuthakan. Pada tarikh perbicaraan iaitu 25 November 2011, Hakim Abd Halim Aman ('hakim 1') membenarkan permohonan PR dalam penghakiman ingkar oleh perayu dan memerintahkan jumlah RM1,055,000 diserahkan kepada Kerajaan Malaysia ('perintah pelucuthakan'). Lima tahun kemudian, perayu mendapati untuk pertama kali kewujudan perintah pelucuthakan tersebut. Perayu kemudiannya mengarahkan peguamnya memfailkan permohonan mengetepikan perintah pelucuthakan tersebut. Permohonan perayu dibawa ke hadapan Hakim Mohd Sofian ('hakim 2') untuk pelupusan. Sebelum perbicaraan permohonan mengetepikan perintah pelucuthakan, PR membangkitkan bantahan awalan ('BA') bahawa Mahkamah Tinggi *functus officio* kerana perintah bertarikh 25 November 2011 adalah perintah muktamad. Bantahan awalan itu dipertahankan oleh hakim 2, yang seterusnya menolak permohonan perayu untuk mengetepikan perintah pelucuthakan. Terkilan dengan keputusan hakim 2, perayu merayu ke mahkamah ini. Perayu membangkitkan dua alasan utama, iaitu (i) hakim 2 terkhilaf dalam memutuskan bahawa beliau tiada bidang kuasa untuk mengetepikan perintah pelucuthakan bertarikh 25 November 2011 yang diberikan oleh hakim 1; dan (ii) hakim 2 terkhilaf dalam memutuskan bahawa perayu sepatutnya hanya boleh merayu dan beliau tidak boleh melaksanakan kuasa tersirat bagi mengetepikan perintah pelucuthakan.

Diputuskan (membenarkan rayuan)
Oleh Kamardin Hashim HMR menyampaikan penghakiman mahkamah:

(1) Peraturan keadilan asasi dan prosedur yang membentuk bahagian penting common law harus dipenuhi sepenuhnya sebelum harta seseorang boleh dilucuthakan tanpa apa-apa pampasan. Hak untuk mendengar adalah salah satu daripada perintah peraturan keadilan asasi. Pelanggaran peraturan-peraturan ini berjumlah pada menyalahi per. 13 Perlembagaan Persekutuan. Perintah pelucuthakan sebagai perintah ingkar yang dibuat dalam ketidakhadiran perayu dan tanpa mendengar pihak perayu, adalah perintah yang melanggar peraturan keadilan asasi dan dengan itu harus diketepikan *ex debito justitiae* oleh hakim 2. Hakim 2 telah dengan jelasnya terkhilaf apabila beliau membenarkan BA itu.

(2) Perayu tidak merayu kepada Mahkamah Tinggi dan tidak menuntut Mahkamah Tinggi membuat semakan atau menolak keputusan terdahulu yang dibuat oleh hakim 1. Oleh itu, perintah pelucuthakan bertarikh 25 November 2011 bukan perintah muktamad dan tidak boleh dirayu. Apa yang dipohon perayu adalah untuk hakim 2 menggunakan kuasa sedia ada untuk mengetepikan perintah pelucuthakan atas alasan-alasan pelanggaran keadilan asasi dan/atau atas pepatah *audi alteram partem*, pembatalan dan kepenyalahan undang-undang. Hakim 2 boleh dan kompeten untuk mengetepikan perintah pelucuthakan yang dibuat sebelum ini oleh hakim 1. Fakta bahawa perintah pelucuthakan adalah terbatal kerana melanggar peraturan keadilan asasi dan tambahan, telah diperoleh secara tidak betul, perayu berhak di sisi undang-undang untuk memohon dan mengetepikan perintah yang dipertikaikan tanpa memfailkan rayuan.

Case(s) referred to:

Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 6 CLJ 1 FC ***(refd)***

Azmi Osman v. PP & Another Appeal [2015] 9 CLJ 845 CA ***(dist)***

B Surinder Singh Kanda v. The Government of The Federation of Malaya [1962] 1 LNS 14 PC ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Cameron v. Cole [1944] 68 CLR 571 ***(refd)***

CIMB Investment Bank Bhd v. Metroplex Holdings Sdn Bhd [2014] 9 CLJ 1012 FC ***(refd)***

Dato' Seri Anwar Ibrahim v. PP [2010] 7 CLJ 397 FC ***(refd)***

Hock Hua Bank Bnd v. Sahari Murid [1980] 1 LNS 92 FC ***(refd)***

Karpal Singh & Anor v. PP [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183 SC ***(refd)***

Lee Gee Pheng v. RHB Bank Bhd [2003] 4 CLJ 639 CA ***(refd)***

PP v. Dato' Saidin Thamby [2012] 4 CLJ 15 CA ***(refd)***

Legislation referred to:

Anti-Money Laundering and Anti-Terrorism Financing Act 2001, ss. 4(1)(a), 32, 44, 50, 56(1), 61(2)

Courts of Judicature Act 1964, s. 25(1)

Criminal Procedure Code, ss. 4, 5

Exchange Control Act 1953, s. 9

Federal Constitution, arts. 13(1), 160

For the appellant - Geethan Ram Vincent, Elizabeth Shanti, Frida Krishnan & Lavaniya Raja; M/s The Chambers of Frida

For the respondent - Tengku Intan Suraya Tengku Ismail; DPP

[Editor's note: Appeal from High Court, Johor Bahru; Criminal Application No: 44-25-2011 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Kamardin Hashim JCA:

Introduction

[1] This is an appeal against the decision of the learned High Court Judge at Johor Bahru given on 6 March 2017 dismissing the appellant's application to set aside the forfeiture order made by the High Court on 25 November 2011.

Background Facts

[2] The background facts are these. On 22 August 2011 the Public Prosecutor filed an application encl. 2 for a forfeiture order pursuant to s. 56 of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ("AMLATFA"). By encl. 2, the Public Prosecutor also sought for an order for the publication of a notice in the *Gazette* pursuant to s. 61(2) of the AMLATFA for the appellant to attend before the High Court to show cause as to why cash totalling RM1,055,000 or any accreditation to it in the appellant's current account with Hong Leong Bank, Account No: 00500116205 ought not to be forfeited.

[3] On the appointed date of hearing ie, 25 November 2011, Justice Dato' Abd Halim bin Aman ('the learned judge 1), allowed the Public Prosecutor's application in default of appearance by the appellant and ordered the sum of RM1,055,000 be credited to the Government of Malaysia ('the forfeiture order).

[4] Some five years later, in 2016, the appellant discovered for the first time about the existence of the forfeiture order. The appellant then instructed its solicitors to file an application to set aside the said forfeiture order. The appellant's application by way of notice of motion was filed on 4 July 2016.

[5] The appellant's application came before Justice Dato' Indera Mohd Sofian bin Tan Sri Abdul Razak ('the learned judge 2') for disposal on the 6 March 2017. Prior to the hearing of the application to set aside the forfeiture order, the respondent raised a preliminary objection ('PO') that the High Court was *functus officio* as the order dated 25 November 2011 was a final order.

[6] The learned judge 2 proceeded to hear the preliminary objection and requested parties to address on the following four issues for the court's determination:

(a) Is the High Court Judge herein competent to set aside the earlier order dated 25 November 2011 made by another previous High Court Judge in this case?

A (b) Whether Totti Trading can invoke the inherent powers of the High Court to set aside the order dated 25 November 2011 in a criminal proceeding/case?

(c) Whether the application to set aside the order dated 25 November 2011 should be made under the same suit herein or a fresh suit/proceeding?

B

(d) Whether the order dated 25 November 2011 is a final order, and Totti Trading should have appealed against the said order?

[7] After hearing the parties, the learned judge 2 upheld the PO by the respondent and thereby dismissed the appellant's application to set aside the C forfeiture order on the following grounds:

a. firstly, the Court was of the view that since the relief sought by the applicant was to set aside the order dated 25.11.2011 made in the suit No. 44-25-2011, then the proper mode of proceeding was to file an application under the same suit number and not to file a fresh D application under a fresh suit or proceeding - (see page 14, paragraph 2, Jilid 1 of the AR);

b. secondly, the Court was of the considered view that the order made on 25.11.2011 was a final order made by the earlier High Court judge. It was a final order because it disposed of the matter in that the money was to be forfeited to the Government. At this juncture E the Court was not concern whether the earlier HC Judge had made a correct ruling and/or decision but whether the ruling and/or decision was appealable or not. (The Court referred to the meaning of the term 'decision' as defined in section 3 of the Court of Judicature Act (CJA), 1964) – (see page 14, paragraph 3, Jilid 1 of the AR); F

c. the Court was of the view that since it was a final order, the only proper recourse for the applicant was to appeal to the Court of Appeal to challenge the order made on ground as adumbrated earlier by the applicant such as not given the right to be heard in breach of rules of natural justice and the order made was a nullity G – (see page 14, paragraph 4 and page 15, paragraph 1, Jilid 1 of the AR);

d. the Court was of the opinion that it had no jurisdiction to set aside the order dated 25.11.2011 made by another High Court of concurrent jurisdiction – (see page 15, paragraph 1, Jilid 1 of the H AR);

e. the Court too could not invoke its inherent power to set aside the order dated 25.11.2011 because there is another remedy available to the applicant namely to appeal against the order made – (see page 15, paragraphs 2 and 4, Jilid 1 of the AR); and

I f. the Court could not also hear the application to set aside as the subject matter was not procedural matter but substantive in nature – (see page 16, paragraph 1, Jilid 1 of the AR).

[8] For the above-stated reasons, the learned judge 2 held that it had no jurisdiction to set aside the order dated 25 November 2011 granted earlier by the learned judge 1 and dismissed the appellant's application. The learned judge 2 was also of the view that it was *functus officio*. The learned judge 2 in his judgment said:

> In this regards, the Court was of the view that since it was a final order, the only proper recourse for the applicant was to appeal to the Court of Appeal to challenge the order made on ground as adumbrated earlier by the applicant such as not given the right to be heard in breach of rules of natural justice and the order made was a nullity. The Court was of the opinion that it has no jurisdiction to set aside the order dated 25.11.2011 made by another High Court of concurrent jurisdiction.
>
> The Court too could not invoke its inherent power to set aside the order dated 25.11.2011 because there is another remedy available to the applicant namely to appeal against the said order made.

[9] In coming to his decision, the learned judge 2 relied on the Court of Appeal's decision in *Azmi Osman v. PP & Another Appeal* [2015] 9 CLJ 845, as submitted by the respondent, in arriving at his decision.

[10] Aggrieved with the decision of the learned judge 2, the appellant appealed to this court. We heard the appeal on 9 October 2017. After hearing the parties, we allowed the appeal. These were the reasons for us in allowing the appeal.

Respondent's Forfeiture Application – Some Background Facts

[11] Before we go any further, it is pertinent for us to look at some background facts of the respondent notice of motion dated 22 August 2011 in encl. 2. Some background facts can be deduced from the affidavits in support of the application in encl. 2 sworn in by Mohd Haziq Dhiyauddin bin Razali, the Deputy Public Prosecutor in charge of the matter and two affidavits sworn in by one Md Suhardi bin Md Shaari, an investigating officer with the Central Bank of Malaysia and also from the affidavit in support of Jow John Sing, sworn on behalf of the appellant.

[12] Based on the three affidavits, disclosed the following facts:

(a) Jow John Sing ('Jow') was previously the sole proprietor of the appellant and the sole signatory to the Hong Leong Bank Bhd's account No: 00500116205, Johor Bahru Branch ('HLBB account) where the cash of RM1,055,000 subjected to the forfeiture order was;

(b) The appellant's HLBB account was frozen under s. 44 of the AMLATFA on 23 August 2010;

(c) Jow was served with the order dated 23 August 2010 to freeze the HLBB account under s. 44 of the AMLATFA on 25 August 2010;

(d) Jow's statement pursuant to s. 32 of the AMLATFA was recorded on the same day ie, on 25 August 2010;

(e) HLBB was issued with an order dated 18 November 2010 to seize all monies in the HLBB account under s. 50 of the AMLATFA;

(f) The respondent filed the notice of motion in encl. 2 dated 22 August 2011 against the appellant pursuant to ss. 56(1) and 61(2) of the AMLTFA in essence to:

> memanggil mana-mana pihak ketiga yang menuntut mempunyai apa-apa kepentingan mengenai harta-harta alih di atas supaya hadir di hadapan Mahkamah pada tarikh yang dinyatakan dalam notis untuk menunjuk sebab mengapa harta-harta alih yang telah disita tidak boleh dilucuthakkan dan seterusnya memohon Mahkamah yang Mulia ini melucuthakkan – akaun semasa bernombor 00500116205 di Hong Leong Bank Berhad cawangan Johor Bahru, Johor milik Totti Trading Nombor Pendaftaran Perniagaan JM 0374701-W di Hong Leong Bank Berhad cawangan Johor Bahru, Johor dan wang di dalamnya yang berjumlah RM1,055,000.00 dan apa-apa pertambahan kepadanya yang disita pada 18.11.2010 kepada kerajaan Malaysia;

(g) Pursuant to s. 61(2) of the AMLATFA, the notice to third parties was published in the *Gazette* dated 25 October 2011 calling upon any third party who claims to have any interest in the property to attend before the court on 25 November 2011 at 8.30am to show cause as to why the property shall not be forfeited;

(h) On 25 November 2011, the High Court made an order crediting the sum of RM1,055,000 to the Government of Malaysia;

(i) There was no prosecution or conviction for an offence under s. 4(1) of the AMLATFA; and

(j) The respondent's notice of motion in encl. 2 was premised on the grounds that the monies seized in the appellant's HLBB account and later forfeited were proceeds from an offence under s. 9 of the Exchange Control Act 1953 ('ECA Act'), and hence is related to an offence of money laundering under s. 4(1)(a) of the AMLATFA. The offence under s. 9 of the ECA Act was the purported predicate offence.

The Appeal

[13] Before us, learned counsel for the appellant canvassed two main grounds, namely:

(a) That the learned trial judge 2 erred in holding that he had no jurisdiction to set aside the forfeiture order dated 25 November 2011 granted by the learned judge 1; and

(b) That the learned judge 2 erred in holding that the appellant must only appeal and that he could not exercise his inherent powers to set aside the forfeiture order.

Our Deliberations And Decisions

[14] In regard to the first ground, learned counsel submitted that learned judge 2 erred when His Lordship held that the forfeiture order dated 25 November 2011 was a final order. Learned counsel argued that the forfeiture order is not a final order because it was not made after hearing the appellant. Instead, it was a default order made in the absence of the appellant. The appellant was not heard before the forfeiture order was granted by the learned judge 1.

[15] Learned counsel further argued that the forfeiture order was made in breach of the rules of natural justice. Therefore, the learned judge 2 was seized with the inherent jurisdiction to set aside the forfeiture order. Learned counsel relied on *Hock Hua Bank Bhd v. Sahari Murid* [1980] 1 LNS 92; [1981] 1 MLJ 143 where the Federal Court held:

> Clearly the court has no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it has been entered or an order after it has been drawn up, … **unless it is a judgment by default or made in the absence of a party at the trial or hearing.** (emphasis added).

[16] We agreed with learned counsel submission on the issue raised in the first ground of appeal. The principle laid down in *Hock Hua Bank Bhd* had been duly fortified by the Federal Court in *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 where it was decided as follows:

> It is of course settled law as laid down by the Federal Court in *Hock Hua Bank* case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v. Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court "… which a person affected by the order is entitled to apply to have set aside *ex debito justitiae* in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make.

The Privy Council through Lord Diplock also emphasised that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts *ex debito justitiae* the right to have it set aside without going into the appeal procedure, "save that specifically it includes orders that have been obtained in breach of rules of natural justice". Similarly, in this country the statement of Abdoolcader J (as he then was) in *Eu Finance Bhd v. Lim Yoke Foo* [1982] 1 LNS 21; [1982] 2 MLJ 37 @ 39 provides the correct guideline on the subject:

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon – in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent.

[17] In a more recent decision in *CIMB Investment Bank Bhd v. Metroplex Holdings Sdn Bhd* [2014] 9 CLJ 1012, the Federal Court held:

> In *Badiaddin*, the Federal Court settled that there is inherent and discretionary jurisdiction to set aside *ex debito justitiae* an order of court regularly obtained where there has been a breach of the rules of natural justice following the Privy Council case of *Isaacs v. Robertson* [1984] 3 All ER 140; [1985] AC 97.

[18] In the Australian case of *Cameron v. Cole* [1944] 68 CLR 571, it was held:

> It is a fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. It this principle be not observed, the person affected is entitled, *ex debito justitiae*, to have any determination which affects him set aside; and a court which finds that it has been led to purport to determine a matter in which there has been a failure to observe the principle has inherent jurisdiction to set its determination aside: *Craig v. Kanssen* 1943.

[19] We refer to art. 13(1) of the Federal Constitution which protects the rights of one's property. Article 13 guaranteed that "no person shall be deprived of property save in accordance with law". Whereas art. 160 of the Federal Constitution defined "law" to includes "written law, the common law insofar as it is in operation in the Federation or any part thereof, or any custom or usage having the force of law in the Federation or any part thereof". We are of the view that the rules of natural justice and procedure which form an integral part of the common law must be fully satisfied before one's property can be forfeited without any compensation. The right to be heard is one of the pillars of the rules of natural justice. Any breach of these rules amounts to a contravention of art. 13 of our Federal Constitution.

[20] We agreed with learned counsel's submission that the forfeiture order being a default order made in the absence of the appellant and without hearing the appellant, is an order in breach of natural justice and therefore liable to be set aside on *ex debito justitiae* by the learned judge 2. The learned judge 2 had clearly erred when His Lordship allowed the PO of the learned Deputy Public Prosecutor.

[21] In *B Surinder Singh Kanda v. The Government of The Federation of Malaya* [1962] 1 LNS 14; [1962] 1 MLJ 169, the Privy Council held:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from celebrated judgment of Lord Loreburn, LC in *Board of Education v. Rice* [1911] AC 179, 182, 27 TLR 378 down to the decision of their Lordships' Board in *Ceylon University v. Fernando* [1960] 1 WLR 223; [1960] 1 All ER 631 PC.
>
> It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The Court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The Court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the Judge without his knowing. Instances which were cited to their Lordships were *Re Gregson* (1894) 70 LT 106, *Rex v. Bodmin Justices* [1947] KB 321; [1947] 1 All ER 109 and *Goold v. Evans* [1951] 2 TLR 1189 to which might be added *Rex v. Architects Registration Tribunal* [1945] 2 All ER 131; 61 TLR 445 and many others.

[22] The Privy Council then went on to set aside the disciplinary proceedings for breach of natural justice. At p. 178 of the reported case, Lord Denning held:

> Applying these principles their Lordships are of opinion that Inspector Kanda was not in this case given a reasonable opportunity of being heard. They find themselves in agreement with the view expressed by Rigby J. in these words: In my view the furnishing of a copy of the Findings of the Board of Inquiry to the Adjudicating Officer appointed to hear the disciplinary charges, coupled with the fact that no such copy was furnished to the plaintiff, amounted to such a denial of natural justice as to entitle this Court to set aside those proceedings on this ground. It amounted, in my view, to a failure to afford the plaintiff a reasonable opportunity of being heard in answer to the charge preferred against him which resulted in his dismissal.

[23] The learned Deputy Public Prosecutor (the learned Deputy) argued that one High Court Judge cannot overrule another High Court Judge who made the decision at some crucial stage of proceedings in the same case. The learned Deputy relied on this court's decision in *Azmi Osman v. PP & Another Appeal, supra.* Much as we agree with the proposition enunciated in that decision, nevertheless, the facts of that case are clearly distinguishable and different from the present case at hand.

[24] In *Azmi Osman v. PP & Another Appeal, supra*, the facts disclosed as follows:

(a) Azmi ("the accused") was charged before the Sessions Court in Johor Bahru on four charges of money laundering under s. 4 of the AMLAFTA.

(b) At the end of the prosecution's case, the Sessions Court Judge ("the SCJ") found that the prosecution had failed to establish a *prima facie* case on all the four charges, and acquitted the accused without calling for his defence.

(c) The prosecution appealed to the High Court ("first appeal") against this decision of the SCJ. The first appeal was heard by the High Court Judge 1 ("the HCJ 1"), who allowed the appeal and ordered the accused to answer to all the four charges before the Sessions Court.

(d) After hearing evidence for the defence, the same SCJ this time convicted the accused on all four charges and sentenced him. The SCJ also ordered a third forfeiture of the property of the accused that were seized.

(e) Aggrieved by this decision of the SCJ, the accused appealed to the High Court against the conviction, sentence and order of the issuance of the notice under s. 61 ("second appeal").

(f) the second appeal was heard by the High Court Judge 2 ("the HCJ 2"), who made the following orders:

i. having reviewed the ruling of the HCJ 1 on whether defence ought to have been called, the HCJ 2 found that the accused ought not to have been called to enter his defence on all the four charges;

ii. upon review, the HCJ 2 found that the prosecution had not established a *prima facie* case on all four charges;

iii. the HCJ 2 acquitted the accused;

iv. then went on to hold that assuming he was wrong in his finding that prosecution had not proved a *prima facie* case, he proceeded to consider the defence and concluded that the SCJ was correct in finding the accused guilty as his version was to improbable and did not create any reasonable doubt in the prosecution's case; and

v. that the issue of a notice under s. 61 of the AMLAFTA by the SCJ was affirmed.

(g) The prosecution appealed against the order of acquittal and discharge of the HCJ 2, and the accused appealed against the issuance of the s. 61 notice to the Court of Appeal.

(h) Before the Court of Appeal, the prosecution raised a preliminary issue: "whether the HCJ 2 in dealing with an appeal from the SCJ against conviction, was competent to review the evidence led at the prosecution stage, in determining whether there was a *prima facie* case established and for defence to be called, as had been found by the HCJ 1, when the HCJ 1 allowed the appeal by the prosecution against the order of acquittal at the end of the prosecution stage of the same case.

[25] The Court of Appeal held at p. 859, as follows:

> [28] With respect, we are of the view that the learned HCJ2 had erred when he disturbed the findings of the earlier HCJ1 who had ordered the accused to enter on his defence to all the four charges, on appeal. The dominant issue that ought to guide the HCJ2's mind in dealing with a situation that has now become this preliminary issue must of necessity be the fact that when the HCJ1 made that decision for defence to be called, the latter was carrying out his appellate jurisdiction. Granted that the High Court jurisdiction is coordinate among its judges, inherent in that concept is the fact that a High Court Judge cannot overrule another High Court Judge who had made a decision at some crucial stage of proceedings in the same case. In the context of this appeal before us, the HCJ1 had ordered the accused's defence to be called to answer to the four charges levelled against him. The jurisdiction to correct that purported error, said by the HCJ2 as having been committed by the HCJ1, with respect, lies with the Court of Appeal, should there be an appeal against the decision of the HCJ2. In other words, as much as a High Court Judge's decision does not bind his brother or sister judge on the High Court bench, by the same token, neither does it lie with his brother or sister judge of the High Court to overturn his decision in the same case. In a situation now prevailing in this case, the role of the HCJ2 is only limited to see whether the defence evidence as led has succeeded in creating a reasonable doubt in the *prima facie* case as found by the HCJ1 on appeal by the prosecution. With respect, this must be preferred position as to what the proper approach ought to be, as was employed by the Court of Appeal in *Sulaiman*'s case *(supra)*. Coordinate jurisdiction connotes parity and as such, it does not admit nor permit mutual overriding or overruling each other's decision. Only a higher appeal court can disturb or vary or affirm a High Court's decision.
>
> [29] In the context of the situation that arose in this case before us, it is therefore our view that the reason advanced by the learned HCJ2 that had purportedly provided him with the power to review the HCJ1 decision to call for the defence to be entered was, with respect, flawed and erroneous. As such, on the preliminary issue raised by the learned deputy,

A we find that there is merit in his contention. The learned HCJ2 was wrong in reviewing and overturning the earlier decision of the HCJ1, in the first appeal by the prosecution. His role, in the circumstances, as stated above, is limited to determining whether the defence had raised a reasonable doubt at the end of the defence case.

B **[26]** It is thus clear that in *Azmi Osman*'s case that:

(a) the HCJ 2 in the second appeal had reviewed and overruled the decision of the HCJ 1 in the first appeal, wherein the HCJ 1 was carrying out his appellate jurisdiction;

C (b) the HCJ 2's role was limited to only determining the issue in the second appeal before him, ie, 'whether the defence had raised a reasonable doubt at the end of the defence case';

(c) the HCJ 2's role was not to overrule the HCJ 1's decision in the first appeal ie, "whether the defence ought to have been called", which D appeal was not before the HCJ 2 in the second appeal. The HCJ 2 had gone beyond his scope in the second appeal; and

(d) the HCJ 2 was wrong in reviewing and overturning the decision of the HCJ 1 in the first appeal. The jurisdiction to correct any purported error of the HCJ 1 lies with the Court of Appeal.

E **[27]** In the present case, the appellant had not appealed to the High Court and was not seeking for the High Court to review or overrule the earlier decision made by learned trial judge 1. Therefore, in our view, the forfeiture order dated 25 November 2011 is not a final order and it is not appealable. What the appellant asking for is for the learned judge 2 to invoke its inherent F powers to set aside the forfeiture order on the grounds of breach of the rules of natural justice and/or on the maxim of *audi alteram partem*, nullity and illegality. We are also of the view that the learned judge 2 can and is competent to set aside the forfeiture order earlier made by learned judge 1 in this case before us.

G **[28]** The High Court is armed with inherent powers or jurisdiction to be invoked when it is necessary to prevent injustice and to do justice especially in cases where a blatant breach of the rules of natural justice occurred. The High Court derived the inherent powers or jurisdiction from s. 25(1) of the Courts of Judicature Act 1964 as well as ss. 4 and 5 of the Criminal H Procedure Code to arrest a wrong (see *Dato' Seri Anwar Ibrahim v. PP* [2010] 7 CLJ 397; *Karpal Singh & Anor v. PP* [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183; *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1).

I

[29] It was not disputed by the respondent that the forfeiture order was obtained without the knowledge of the appellant. What the learned Deputy argued before us was the delay in the appellant to file their application to set aside the forfeiture order. It was not denied as well that the appellant was not heard before the forfeiture order was churned out by the learned judge 1. In this respect, we agreed that it was crystal clear that the rule of natural justice had been breached. On this natural justice application, we can do no better than reproducing Abdul Malik Ishak JCA explanation in *PP v. Dato' Saidin Thamby* [2012] 4 CLJ 15, as follows:

> [148] As to the meaning of "natural justice", the case of *Walter Annamunthodo (supra)* at p. 949 explains it lucidly in this way:
>
> > 'Natural justice' is not the same thing as sophisticated justice; the most famous passage on the point is in *Local Government Board v. Arlidge* [1915] AC 120, 138; 30 TLR 672, HL. There are three basic elements which, by and large, make up the sum of natural justice: (i) The complainant must be given fair notice of the charge against him. (ii) He must have a fair opportunity of meeting that charge, and under that is included a fair hearing. (iii) The tribunal must reach a decision which is honest and unbiased. The authority for those three propositions is Bowen LJ in *Leeson v. General Council of Medical Education and Registration* [1889] 43 Ch. D 366, 383, CA.
>
> [149] When we talk about natural justice, we are referring to the specific procedural rights in the English legal system which are adopted by our courts. It concerns the duty to act fairly. Natural justice encompasses two basic rules, namely, the rule against bias (*nemo judex in causa sua*) and the right to a fair trial (*audi alteram partem*).
>
> [150] The rule against bias is grounded on the need to maintain public confidence in our legal system. There are two forms of bias. Firstly, actual bias. Secondly, imputed bias or apparent bias. It is very difficult to prove actual bias. Whereas imputed bias, once established, will render a decision being void without the need for any investigation into the likelihood or suspicion of bias.
>
> [150] Everyone is entitled to a fair hearing. Individuals should not be penalised by decisions that affect their rights or legitimate expectations unless they have been given prior notice about the case so that they have a fair opportunity to answer and to present their own case.
>
> [151] To maintain public confidence in the legal system, the basic concept of impartiality must be adhered to religiously. Lord Denning, the Master of the Rolls, in *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon And Others, Regina v. London Rent Assessment Panel Committee, Ex parte Metropolitan Properties Co. (F.G.C.) Ltd.* [1968] 3 WLR 694, CA [1969] 1 QB 577, CA, aptly said at p. 599:

> Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'.

[152] Lord Hewart, the Lord Chief Justice of England and Wales, said that, "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" (*The King v. Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256 at 259).

[153] Here, the trial court invoked s. 8 of the PCA in its written judgment written two years after the respondent was convicted without giving prior notice to the respondent or the respondent's counsel. Natural justice allows the respondent or the respondent's counsel to claim the right to adequate notification before the trial court invoked s. 8 of the PCA in its written judgment. Chief Justice William Erl in *Cooper v. The Board of Works for the Wandsworth District* [1863] 14 CB (NS) 180 at p. 414 held that the lack of notice and hearing afforded to Cooper could be said to be a form of abuse as he had been treated as if he did not matter.

[154] And Lord Mustill in *Regina v. Secretary of State for the Home Department, Ex parte Doody, Same v. Same, Ex parte Pegg, Same v. Same, Ex parte Pierson, Same v. Same, Ex parte Smart* [1944] 1 AC 531, HL, at p. 560, had this to say about fair hearing:

> Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer.

[30] As regards to the delay in filing the application to set aside the impugned order, this had been explained in the Jow's affidavit that there had been constant communications and correspondences between the appellant and the respondent. The respondent even recorded Jow's statement on the 25 August 2010, three days after the notice dated 23 August 2010 was issued. Jow's contact numbers had been revealed to the respondent but the respondent through the investigating officer was unable to serve the notice or to inform the appellant of the hearing date fixed by the court. If we have to look at the affidavit tambahan of the investigating officer, there was only one attempt had been made to serve the notice on the appellant at both the appellant's addresses on the same day ie, 22 August 2011. There was already solicitors on record acting for the appellant at the time ie, Messrs Hanif Hassan & Co., but they were not informed either of the hearing date. It is observed from the record that the *Gazette* was done on 25 October 2011 and the impugned order was issued on 25 November 2011, on the first hearing date itself fixed by the court which is also the date stated in the *Gazette*. We are of the view that the forfeiture order was in fact not in order and not regularly obtained.

[31] With that, we now move to the second ground of appeal that the learned judge 2 erred in holding that the appellant must only go by way of an appeal to set aside the forfeiture order. Learned judge 2 stated in his judgment that he could not exercise his inherent powers because there was an alternative remedy available to the appellant and that was to appeal the decision to the Court of Appeal. We agree with learned counsel for the appellant that even though alternative remedy by way of appeal was available to the appellant, nevertheless, the fact that the forfeiture order is a nullity as it was in breach of the rule of natural justice and to add, not regularly obtained, the appellant is entitled in law to apply and set aside the impugned order without resort to filing of an appeal.

[32] In *Badiaddin*'s case, *supra*, this point is clear that:

> The Privy Council through Lord Diplock also emphasised that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts *ex debito justitiae* the right to have it set aside without going into the appeal procedure … .

[33] In *Lee Gee Pheng v. RHB Bank Bhd* [2003] 4 CLJ 639 Court of Appeal had held:

> The appellant also complaint that the learned judge erred in law and in fact in ruling that he was *functus officio* when deciding on the application. It is worthy of note that once an order of court has been drawn up and perfected, as in this case, it cannot be altered, varied or set aside as the court is *functus officio*. The proper recourse for a party dissatisfied with the order is to appeal against it. However, this general principle is subject to certain established exception which allow the court to set aside or amend a final order. A final order may be set aside or amended without the need to appeal in the following cases:
>
> (i) ...;
>
> (ii) ...;
>
> (iii) where the order has been obtained in breach of natural justice: *Muniandy a/l Thamba Kaundan & Anor v. Development & Commercial Bank Bhd & Anor* [1996] 2 CLJ 586.
>
> (iv) ...; and
>
> (v) … .

Conclusion

[34] In the upshot, we allowed the appeal. We ordered that the matter be remitted back to the Johor Bahru High Court to hear the appellant's application to set aside the forfeiture order dated 25 November 2011 on merits.

[35] We so ordered.